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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 167

NATIONAL BANK OF COMMERCE IN MEMPHIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, National Bank of Commerce in Memphis, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered in this case on April 6, 1950 (R. p. 191); and that this Court review and reverse the judgment and decision of the Court of Appeals for the Sixth Circuit.

SUMMARY STATEMENT.

The United States Court of Appeals for the Sixth Circuit in affirming the judgment of the District Court of the United States for the Western Division of the Western District of Tennessee has failed to apply, as it is required to do in this case, the principles of law announced by the Supreme Court in **Helvering v. Alabama Asphaltic Limestone Company**, 315 U. S. 179, 86 L. ed. 775; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, 315 U. S. 185, 86 L. ed. 780; and **Helvering v. Southwest Consolidated Company**, 315 U. S. 194, 86 L. ed. 789.

The District Court concluded that there was a statutory reorganization of Bank of Commerce & Trust Company into the Petitioner, National Bank of Commerce in Memphis, and that Petitioner was a party to the reorganization under the provisions of Section 112 (g) (1) (D) and Section 112 (g) (2) of the Internal Revenue Code [26 U. S. C. A., Section 112 (g) (1) (D) and Section 112 (g) (2)] (R. p. 93). The Court of Appeals adopted this conclusion of the District Court (R. p. 109). The Tax Court of the United States in a case involving a stockholder of Bank of Commerce & Trust Company was required to pass on the fact of reorganization and determined that there was a statutory reorganization of Bank of Commerce & Trust Company into the Petitioner, National Bank of Commerce in Memphis. **W. N. Fry**, 5 T. C. 1058.

Inconsistent with its basic conclusion that the Petitioner is the end product of a statutory reorganization, the District Court decided and the Court of Appeals affirmed that the 1937 acquisition by the Petitioner from its predecessor, Bank of Commerce & Trust Company, of the bank building, furnishings, and fixtures, was not in connection with or within the scope of the reorganization but was a sale

for cash and, therefore, Petitioner was not entitled to use, for the purpose of computing its allowable deductions for depreciation, the basis of such assets in the hands of its predecessor transferor, Bank of Commerce & Trust Company (R. pp. 93, 191).

Bank of Commerce & Trust Company (hereinafter referred to as Old Bank) was a State banking institution organized under the laws of the State of Tennessee with its banking house and place of business located at 45 South Second Street, Memphis, Tennessee (R. pp. 16, 17). In 1933 Old Bank was confronted with the imminent possibility of closing as a result of a run on the bank incident to the widespread and general depression. To insure payment to its depositors in full, the Old Bank borrowed $4,000,000.00 from the Reconstruction Finance Corporation and secured the loan by a pledge of the Bank's assets and an additional pledge of about $2,000,000.00 by individuals who were directors, stockholders or depositors of the Bank (R. p. 17). As a solution to the dilemma in which the Old Bank found itself, the persons in control of the Old Bank determined to organize a new national bank (R. pp. 17, 18). Such a bank was organized under the name of National Bank of Commerce in Memphis and is the Petitioner herein. The Petitioner will sometimes hereinafter be referred to as the New Bank. The New Bank was organized on May 1, 1933, and the Old Bank subscribed and paid for all the stock of the New Bank except the 140 qualifying shares required to be held by the directors of the New Bank. The Old Bank then owned 9,860 shares of the 10,000 shares of the total outstanding stock, or 98.6% of such stock (R. pp. 17, 18, 19). The New Bank forthwith took over substantially all the liquid assets and banking business of the Old Bank and the Old Bank discontinued its general banking business on May 1, 1933 (R. pp. 45, 46).

The New Bank immediately commenced to function as a national bank in the banking house at 45 South Second Street, Memphis, Tennessee, and there was no interruption in the transacting of banking business in this location. The New Bank continued the banking business at the same location with substantially the same employees as had been employed by the Old Bank. A committee was appointed to liquidate the Old Bank and surrender its charter (R. p. 46).

Prior to January 5, 1937, record title to the realty, banking house, furnishings and fixtures then used by the New Bank was in the Old Bank (R. pp. 98, 99). On that date, after release by the Reconstruction Finance Corporation of its lien on the building and fixtures, title to the realty, banking house, furnishings and fixtures was conveyed from the Old Bank to the New Bank. The transaction was reflected on the books of the Old Bank and the books of the New Bank as a transfer for a consideration of $950,000.00, which was immediately applied to reduce the indebtedness of the Old Bank to the Reconstruction Finance Corporation (R. pp. 99, 100). The adjusted basis of the property conveyed was $1,666,297.74 at the date of transfer (R. p. 22).

All of the stock of the New Bank was subsequently distributed to the stockholders of the Old Bank, the first of such distributions being in 1939 and the second and last distribution being in 1946. The charter of the Old Bank was surrendered in 1947 (R. p. 100). All of the depositors of the Old Bank were paid in full (R. p. 70).

JURISDICTION.

The jurisdiction of this Court is invoked under c. 646, 62 Stat. 928 (1948), 28 U. S. C., Section 1254 (1).

On April 6, 1950, the United States Court of Appeals for the Sixth Circuit entered an order denying the Petitioner's petition for rehearing (R. p. 191). This is reported at ... F. (2d) ... The opinion of the District Court is reported at 87 F. Supp. 302. The particular ground of jurisdiction is that the District Court and the Court of Appeals have decided a Federal question, namely, the application of a Federal Revenue Law in conflict with the principles of law announced by the Supreme Court in **Helvering v. Alabama Asphaltic Limestone Company**, 315 U. S. 179, 86 L. ed. 775; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, 315 U. S. 185, 86 L. ed. 780; and **Helvering v. Southwest Consolidated Company**, 315 U. S. 194, 86 L. ed. 789.

This case involves the correct interpretation and application of the so-called non-taxable exchange provisions and the reorganization sections of the applicable Revenue Act. The appropriate sections of the statute concerned are included herewith as an appendix to this petition.

The District Court in the first instance and the Court of Appeals, by adopting the opinion of the District Court, have arrived at a decision embodying an interpretation and application of the appropriate revenue statutes which is in conflict with the decisions of the Supreme Court in the cases of **Alabama Asphaltic Limestone Company**, supra; **Palm Springs Holding Corporation**, supra, and **Southwest Consolidated Company**, supra.

QUESTIONS PRESENTED.

Fundamentally, the question presented is whether the broad Congressional policy as to the basis for depreciation deductions on properties involved in reorganizations or other non-taxable exchanges is to be effectuated by due regard for the substance of the transactions, or whether this broad Congressional policy is to be defeated by attributing controlling significance to the form in which a transaction is cast, irrespective of the various exchanges involved, and through which the reorganization is consummated. The failure of the lower Courts to recognize this basic question, namely, whether the label with which the transaction is adorned is determinative, or whether the breadth and purpose of the reorganization and exchange provisions shall control the tax consequences of a necessary course of action taken for reasons germane to the continuance of the business of the corporation, a party to a reorganization, and deemed at the time to be of major importance in reaching the successful culmination of the whole operation, creates the error complained of herein.

The ultimate question is whether the Petitioner, in computing its allowable deductions for depreciation in arriving at its Federal income tax liability, is entitled to compute depreciation on its banking house and banking facilities by using the same cost basis that was used by its predecessor and transferor, Bank of Commerce & Trust Company, when such identical banking house and banking facilities were owned by and stood in the name of Bank of Commerce & Trust Company. This question, in turn, rests upon the question as to whether Petitioner acquired its banking house and banking facilities in a transaction falling within the non-taxable exchange provisions or the reorganization sections of the applicable Revenue Act of 1936 as amended.

The District Court determined that there was a reorganization of Bank of Commerce & Trust Company into the Petitioner, the National Bank of Commerce in Memphis, and that the Petitioner was a party to the reorganization under the provisions of Section 112 (g) (1) (D) and Section 112 (g) (2) of the Internal Revenue Code [26 U. S. C. A., Section 112 (g) (1) (D) and Section 112 (g) (2)], which correspond to the Revenue Act of 1936 as amended (R. p. 93), and the Court of Appeals adopted this conclusion of the District Court (R. pp. 109, 191). The District Court also found that the reorganization was concluded in 1947 with the final distribution to stockholders of Bank of Commerce & Trust Company of their stock in Petitioner (R. p. 100). In the case of **W. N. Fry**, 5 T. C. 1058, the Tax Court of the United States found that there was a reorganization of Bank of Commerce & Trust Company into the Petitioner and that such reorganization was existing and continuing in the year 1945.

Petitioner urged upon both Courts that it acquired its building, furnishings and fixtures in 1937 either (1) in connection with a reorganization, or (2) as the result of a transfer to a corporation solely in exchange for stock or securities in such corporation controlled by the transferor and that, in either event, the basis for depreciation of such properties is prescribed as the basis in the hands of the transferor increased or decreased for gain or loss as provided by Sections 113 (a) (7) and (8) of the Internal Revenue Code [26 U. S. C. A., Sections 113 (a) (7) and (8)]; that no loss was allowable on such an exchange or transfer under Sections 112 (b) (3), (4) and (5) as modified by Sections 112 (e) and 112 (k) of the Internal Revenue Code [26 U. S. C. A., Sections 112 (b) (3), (4) and (5) and Sections 112 (e) and 112 (k)], and consequently that the basis must be the same as in the hands of the transferor (R. pp. 5, 6, 7, 115, 116, 117).

Inconsistent with its determination of the fact of statutory reorganization with respect to Petitioner and that the statutory reorganization was finally consummated in 1947 and in conflict with the judicial determination of the Tax Court in **W. N. Fry**, supra, that the plan of reorganization was in existence and operation in 1945, the District Court and the Court of Appeals have determined that Petitioner's acquisition of its bank building and banking facilities from its predecessor in 1937 was not in connection with or within the scope of the reorganization, contrary to the principles announced by the Supreme Court in **Helvering v. Alabama Asphaltic Limestone Company**, supra, to the effect that the integrated parts of a single scheme may not be isolated and treated as something separate and apart from the scheme of reorganization.

Neither Court gave consideration to or decided the alternative proposition advanced by Petitioner that Section 112 (b) (5) governed, should it be that the property was not acquired "in connection with a reorganization" (R. pp. 116, 117). The lower Court treated Section 112 (b) (5) as applying solely to reorganization exchanges and dismissed the applicability of that Section along with 112 (b) (3) and (4) (R. p. 93). This gave no consideration whatsoever to the purpose for which 112 (b) (5) was enacted, which purpose is to deny losses to one person on transfers to controlled corporations where the sole consideration is stock or securities in such corporations. The assumption of a liability on such transferred property is treated as stock or securities by Section 112 (k) [26 U. S. C. A., Section 112 (k)]. Petitioner urged that the practically simultaneous actions of the release by the Reconstruction Finance Corporation of its lien on the building, the payment of the $950,000.00 on the Reconstruction Finance Corporation debt and the transfer of the building to Petitioner constituted the assumption and discharge of an indebted-

ness within the meaning of Section 112 (k); that this being true, such assumption was to be treated as stock or securities, and, therefore, the basis of the property transferred is determined by Section 113 (a) (8) (A) [26 U. S. C. A., Section 113 (a) (8) (A)] (R. pp. 116, 117).

The Court of Appeals sustained the lower Court upon the findings of fact and conclusions of law and for the reasons stated in the opinion of the trial judge (R. pp. 109, 191).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The District Court and the Court of Appeals have erred in deciding the question in this case in conflict with decisions of this Court in that the lower Courts referred to, in passing on a Federal income tax question, have been governed by the minute form of a particular event to the exclusion of the substance of the greater scope of the entire transaction within which the particular event is circumscribed. Consonant with this approach to the question involved, the lower Courts have also, contrary to the principles announced by this Court, isolated and attributed emphasis out of harmony with the general program involved to a single step in a series of steps culminating in a completed transaction. **Helvering v. Alabama Asphaltic Limestone Co.**, supra; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, supra; **Helvering v. Cement Investors, Inc.**, 316 U. S. 527, 86 L. ed. 1649; **Commissioner v. Ashland Oil & Ref. Co.** (C. C. A. 6), 99 F. (2d) 588, certiorari denied 306 U. S. 661, 83 L. ed. 1057; **Commissioner v. Kahn** (C. C. A. 6), 133 F. (2d) 199; **Prairie Oil & Gas Co. v. Motter** (C. C. A. 10), 66 F. (2d) 309; **Hortense A. Menefee**, 46 B. T. A. 865; and **Independent Oil Co.**, 6 T. C. 194.

In its suit in the District Court to establish its right to compute its allowable deductions for depreciation by using the basis of its predecessor and transferor, Bank of Commerce & Trust Company, with respect to the bank building, furnishings and fixtures, the Petitioner contended that it had acquired the property in connection with a statutory reorganization as defined by the applicable Revenue Act and further that such acquisition fell within the so-called non-taxable exchange provisions of the applicable Revenue Act.

The Government, in its defense to Petitioner's claims, insisted that in the first instance there was no statutory reorganization and that in the second instance, if there was a statutory reorganization, the acquisition of the bank building, furnishings and fixtures was a transaction falling outside the scope of the reorganization in that it was a purchase and a sale. The District Court concluded that there was a statutory reorganization and that the Petitioner was a party thereto under the provisions of Section 112 (g) (1) (D) and Section 112 (g) (2) of the Internal Revenue Code [26 U. S. C. A., Section 112 (g) (1) (D) and Section 112 (g) (2)]. Presumably, the Court of Appeals adopted this conclusion of the District Court. The District Court also determined that the last step in the reorganization proceeding occurred in 1947 when the stockholders in the Old Bank received the last of their stock in the New Bank. In the case of **W. N. Fry**, 5 T. C. 1058, the Tax Court, in referring to this same statutory reorganization, determined that it was still in progress at the time of the Tax Court hearing in 1945. Thus, it has been judicially determined in at least three separate instances that there was a statutory reorganization of Bank of Commerce & Trust Company, and that Petitioner was a party thereto, and that the process of reorganization which was initiated in 1933 was not consummated until a number of years after the date, namely, January 8, 1937, on which record title

to the bank building, furnishings and fixtures was conveyed from Bank of Commerce & Trust Company to the Petitioner, the National Bank of Commerce in Memphis.

Not only does the acquisition of the bank building, furnishings and fixtures by the Petitioner fall squarely within the philosophy of Congress in enacting the reorganization provisions as stated by the Court in **Seiberling Rubber Company v. Commissioner** (C. C. A. 6), 169 F. (2d) 595:

> "The reorganization provisions were enacted to free from the imposition of an income tax purely paper profits or losses where there is no realization of gain or loss in the business sense but merely the recasting of the same interest in different form * * *."

But the acquisition of the bank building meets squarely the literal language of Section 113 (7) (B) which provides that if property was acquired by a corporation in connection with a reorganization then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss, recognized to the transferor upon such transfer under the law applicable to the year of the transfer. Had there been no reorganization, there could have been no acquisition of the bank building in connection with the reorganization and it completely ignores the substance of the entire program of reorganization to conclude that the transfer of the bank building was a stranger to the reorganization proceedings. It is respectfully submitted that the lower Courts, in denying the integrity of the acquisition of the bank building as a part of the reorganization, have failed to apply correctly the principles announced by this Court in **Helvering v. Alabama Asphaltic Limestone Co.**, supra; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, supra; **Helvering v. Southwest Consolidated Company**, supra; **Helvering v. Cement Investors, Inc.**, supra. The recent decision of this Court in **Brown**

Shoe Co., Inc., v. Commissioner of Internal Revenue, ... U. S. ...., delineates the judicial atmosphere in which revenue statutes embodying the broad general policy of Congress with respect thereto need to be considered.

Since the correct application of the principles in the cases just cited establishes that Petitioner acquired the building in connection with a reorganization, it follows logically that Section 112 (b) (4) as modified by Section 112 (e) of the appropriate Revenue Act applies. This fact is recognized by the District Court in its opinion. Pursuant to Section 112 (b) (4) as modified by Section 112 (e), there was no recognized loss to Petitioner's predecessor and transferor, Bank of Commerce & Trust Company. The same result flows from the application of Section 112 (b) (5) as modified by Section 112 (e) and Section 112 (k) and it has been the Petitioner's contention at all times that Section 112 (b) (5) as modified by Sections 112 (e) and 112 (k) was also applicable to the question presented herein. **Helvering v. Cement Investors, Inc.**, supra; **Seiberling Rubber Co. v. Commissioner,** supra.

In determining the substance of a transaction, it is proper to consider the situation as it existed at the beginning and at the end of a series of steps as well as the objects sought to be accomplished, the means employed, and the relation between the various steps. All the steps in the plan must be considered. **Walter S. Heller v. Commissioner,** 2 T. C. 371; **Snowden v. McCabe** (C. C. A. 6), 111 F. (2d) 743. This the lower Courts have failed to observe.

It is, therefore, respectfully submitted that the District Court and the Court of Appeals have failed to apply, as the facts demand in this case that they apply, the principles announced by this Court in **Helvering v. Alabama Asphaltic Limestone Co.**, supra; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue,** supra;

Helvering v. Southwest Consolidated Co., supra, to the end that Petitioner, in computing its allowable deductions for depreciation, use the basis of its predecessor and transferor, Bank of Commerce & Trust Company, with respect to the property acquired by Petitioner in the course of the reorganization, or as an exchange under the provisions of Section 112 (b) (5).

Wherefore, Petitioner respectfully prays that this petition for a writ of certiorari be granted and that this Court's writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit for the purpose of reviewing the question hereinbefore stated, and that upon review, the judgment and decision of the Court of Appeals be reversed and that the Petitioner have such other and further relief as may be deemed proper.

Respectfully submitted,

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APPENDIX.

Internal Revenue Code:

Section 113. Adjusted Basis for Determining Gain or Loss—

(a) Basis (Unadjusted) of Property. The basis of property shall be the cost of such property; except that—

* * * * * * *

(7) Transfers to Corporation. If the property was acquired—

(A) after December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

(8) Property Acquired by Issuance of Stock or as Paid-in Surplus. If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 112. Recognition of Gain or Loss.

(i) Definition of Reorganization. As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization

and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

Revenue Act of 1936, c. 699, 49 Stat. 1648:

Section 112. Recognition of Gain or Loss.

(a) General Rule. Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges Solely in Kind.

* * * * * * *

(3) Stock for Stock on Reorganization. No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) Same—Gain of Corporation. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * * * *

(5) Amendment by Revenue Act 1939. No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to

his interest in the property prior to the exchange. Where the transferee assumes a liability of a transferor, or where the property of a transferor is transferred subject to a liability, then for the purpose only of determining whether the amount of stock or securities received by each of the transferors is in the proportion required by this paragraph, the amount of such liability (if under section 213 of the Revenue Act of 1939 it is not considered as "other property or money") shall be considered as stock or securities received by such transferor. If, as the result of a determination of the tax liability of the taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of the enactment of the Revenue Act of 1939, or by a closing agreement, the treatment of the amount of such liability was different from the treatment which would result from the application of the preceding sentence, such sentence shall not apply and the result of such determination shall be deemed proper. As amended June 29, 1939, c. 247, section 213 (h), 53 Stat. 872.

* * * * * * *

(e) Loss from exchanges not solely in kind. If an exchange would be within the provisions of subsection (b) (1) to (5), inclusive, of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

Revenue Act of 1939, c. 59, 53 Stat. 574:

Sec. 213. Assumption of Indebtedness.

(a) Assumption of Liability Not Recognized.—Section 112 of the Internal Revenue Code (relating to recognition

of gain or loss) is amended by adding at the end thereof the following new subsection:

"(k) Assumption of Liability Not Recognized.—Where upon an exchange the taxpayer receives as part of the consideration property which would be permitted by subsection (b) (4) or (5) of this section to be received without the recognition of gain if it were the sole consideration, and as part of the consideration another party to the exchange assumes a liability of the taxpayer or acquires from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as 'other property or money' received by the taxpayer within the meaning of subsection (c), (d), or (e) of this section and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5); except that if, taking into consideration the nature of the liability and the circumstances in the light of which the arrangement for the assumption or acquisition was made, it appears that the principal purpose of the taxpayer with respect to the assumption or acquisition was a purpose to avoid Federal income tax on the exchange, or, if not such purpose, was not a bona fide business purpose, such assumption or acquisition (in the amount of the liability) shall, for the purposes of this section, be considered as money received by the taxpayer upon the exchange. In any suit or proceeding where the burden is on the taxpayer to prove that such assumption or acquisition is not to be considered as money received by the taxpayer, such burden shall not be considered as sustained unless the taxpayer sustains such burden by the clear preponderance of the evidence."

* * * * * * *

(f) Assumption of Liability Not Recognized Under Prior Acts.—

(1) Where upon an exchange occurring in a taxable year ending after December 31, 1923, and beginning before January 1, 1939, the taxpayer received as

part of the consideration property which would be permitted by subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, to be received without the recognition of gain if it were the sole consideration, and as part of the consideration another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as "other property or money" received by the taxpayer within the meaning of subsection (c), (d), or (e) of Section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts; except that if, in the determination of the tax liability of such taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of enactment of the Revenue Act of 1939, or by a closing agreement, gain was recognized to such taxpayer by reason of such assumption or acquisition of property, then for the purposes of section 112 of the Revenue Act of 1938, and corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, such assumption or acquisition (in the amount of the liability considered in computing the gain) shall be considered as money received by the taxpayer upon the exchange.

(2) Paragraph (1) shall be effective with respect to the Revenue Act of 1924 and subsequent revenue Acts as to the date of enactment of each such Act.